

MAR 20 1978

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-**1328**

RUVEN ST. PIERRE,
v.

Petitioner,

EXXON CORPORATION, BOOKER DRILLING CO., INC.,
and LIBERTY MUTUAL INSURANCE CO.,

Respondents,

RUVEN J. ST. PIERRE,
v.

Petitioner,

EXXON CORPORATION, BENNIE P. TOUPS,
RICHARD N. BOSS and JOE W. MOORE,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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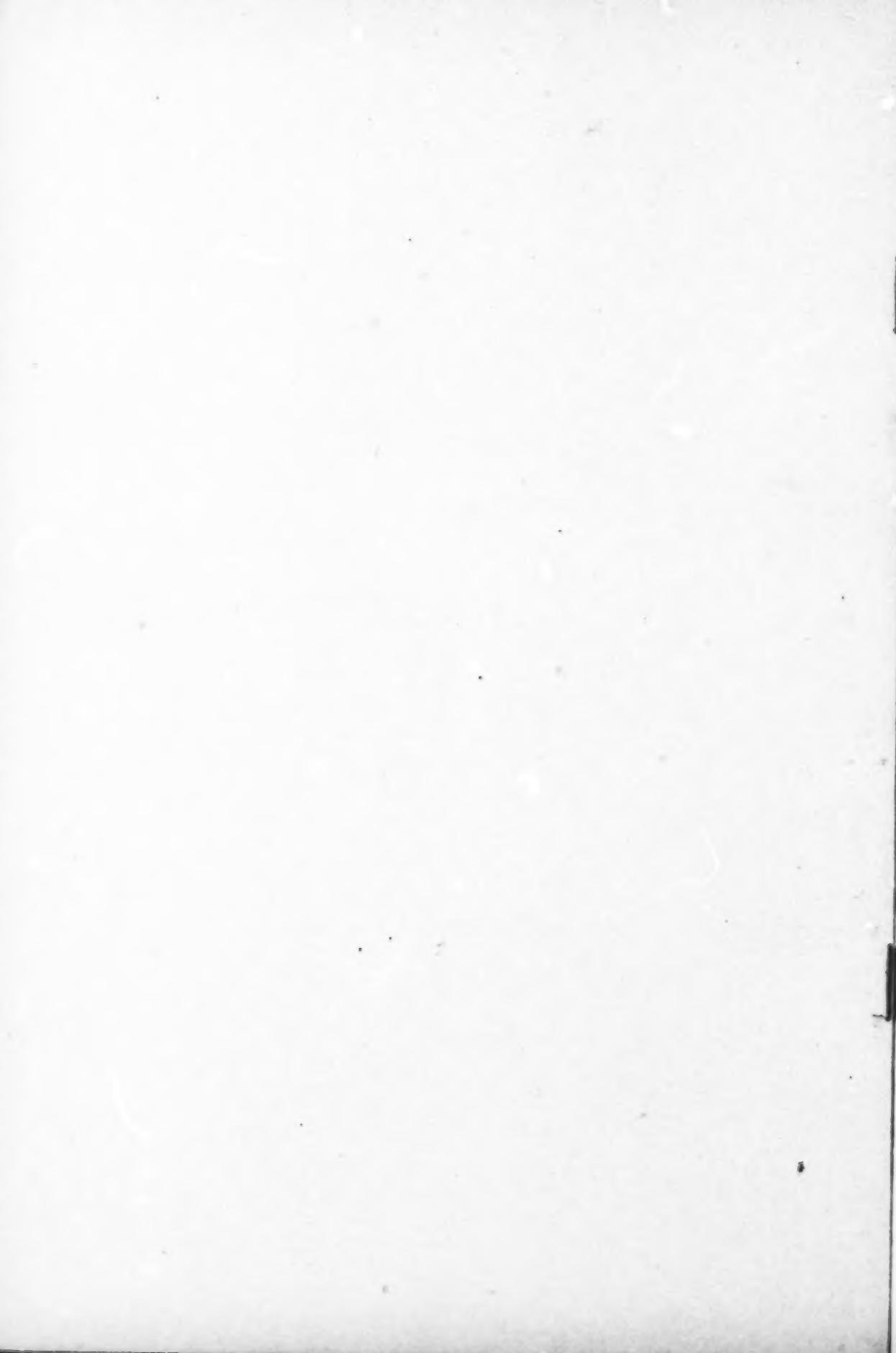
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¹ In each instance the APPENDIX notation refers to the APPENDIX contained in a companion petition, *Gaudet v. Exxon Corporation*, No. 77-1284, filed with this Court March 14, 1978.

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in these

cases on November 4, 1977, rehearing en banc denied December 19, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana in the cases of Ruven J. St. Pierre, petitioner herein, were not printed but appear at page 4a of Appendix A to a companion *Gaudet v. Exxon Corporation* petition No. 77-1284.² The opinion in the related Gaudet case was also not printed but appears as Appendix A to the *Gaudet v. Exxon Corporation* petition (A 1a).

The opinion and judgment of the Fifth Circuit Court of Appeals combining the St. Pierre and Gaudet cases and affirming the decisions of the District Courts was rendered on November 4, 1977, is printed at 562 F.2d 351 (5th Cir. 1977), and is reprinted as Appendix C (A 9a). A petition for rehearing was denied by the Fifth Circuit in the Gaudet case on December 14, 1977, and is printed as Appendix D (A 24a). A petition for rehearing *en banc* in both of the St. Pierre cases was denied on December 19, 1977, and is printed as Appendix E (A 25a).

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered November 4, 1977. A timely petition for rehearing *en banc* in both the St. Pierre cases was denied December 19, 1977. This petition for a writ of certiorari is being filed within 90 days of December 19, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

² All page citations to the Appendices refer to the Appendix contained in the companion *Gaudet v. Exxon Corp.* petition, No. 77-1284, filed with this Court March 14, 1978 and are hereinafter preceded by the designation "A".

STATUTORY PROVISIONS INVOLVED

The relevant portions of the statutory provisions involved appears as Appendix F (A 27a).

QUESTIONS PRESENTED

The Outer Continental Shelf Lands Act (Lands Act), under which this suit was brought, provides that adjacent state law shall control in suits under the Act except to the extent that such state law directly conflicts with applicable federal law. The Lands Act makes applicable the compensation provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) in certain circumstances. Here, LHWCA was asserted by respondent (Exxon) to defeat a suit for negligence brought by an employee (petitioner) of another company (Bourne's Welding) on the theory that petitioner was a "borrowed servant" and thus an employee of Exxon. Summary judgment was granted in favor of Exxon and against petitioner. The questions presented are:

1. When a suit is brought for negligence under the federal Lands Act, and LHWCA is asserted as a defense, is the issue as to whether the suing employee is a "borrowed servant" and thus entitled only to LHWCA compensation an issue to be determined by interpretation of the Lands Act (with state law thus made applicable) or by interpretation of LHWCA?
2. Whether or not federal law applies in a suit under the Lands Act, is the status of "borrowed servant" one to be determined as a matter of law, and thus taken from the jury, or is it a question of fact to be submitted, where there is a disputed pre-trial record, to a jury at trial?
3. What factors determine whether an employee is a borrowed servant under the Lands Act so as to defeat a

suit for common law negligence, and is the weight and inferences to be accorded each of such factors a matter for jury consideration or a matter for judicial determination by way of summary judgment?

4. Is it proper for a federal court to grant summary judgment in favor of a party (Exxon) claiming the existence of a borrowed servant relationship under the Lands Act to defeat a suit for common law negligence where such facts as the following are present:

(a) A contract between Exxon and Welding, petitioner's regular employer, provided that petitioner's work was to be under the control of Welding, that Welding was to be an independent contractor as to all such work performed, and that the Exxon was interested only in the result obtained;

(b) Exxon admitted that St. Pierre was in fact a Welding employee, and St. Pierre swore that only Welding paid his wages, that only Welding could terminate his employment, and that he had been employed by Welding continuously for seventeen years;

(c) Welding's insurer paid LHWCA compensation benefits to petitioner as an employee of Welding;

(d) The nature of the transactions between Exxon, Welding and St. Pierre establishes that St. Pierre functioned as a Welding representative and that as a representative of Welding, Exxon exercised only limited control over St. Pierre as set forth in the following facts contained in the record:

(i) The usual business relationship between Exxon and Welding was a customer-independent contractor relationship whereby Exxon identified projects, Welding personnel performed the obligations of Welding as speci-

fied in the contract, Welding's employees completed the projects in their own way without direct technical direction from Exxon, and Welding billed Exxon for each project so identified and executed;

(ii) Consistent with the characterization above, Exxon's directions to St. Pierre were only for the purpose of indicating the work to be done and co-ordinating activities at the site, and in that sense Exxon's control over St. Pierre was of the same nature as its control over Welding: a customer-independent contractor relationship;

(iii) St. Pierre swore that he was working on a project at the time of the accident as a result of the Exxon/Welding contract, that since Exxon had no welders at the site his services were requested to assist a roustabout crew of general laborers and a supervisor unskilled in the art of specialized welding, that he was usually told what welding work needed to be done, and that he supervised and controlled his own performance without direct project supervision by Exxon.

STATEMENT OF THE CASE

This case arises out of personal injuries sustained by petitioner St. Pierre while providing specialized welding services on a production platform owned by respondent Exxon Corporation. Exxon's platform rests upon the Outer Continental Shelf off the coast of Louisiana near Grand Isle. The accident occurred when a barrel upon which petitioner was standing exploded, injuring St. Pierre.

At the time of the accident, St. Pierre was working on the Exxon platform pursuant to a contract between Bourne's Welding Service, Inc. (Welding) and Exxon. St.

Pierre was an employee ("welder") of Welding (CA 51, 72)² and for many years had regularly been assigned stints of duty on various Exxon platforms. On the day of the accident, St. Pierre was installing a platform generator—a project for which Welding specifically billed Exxon (CA 72).

The Exxon/Welding contract (CA 86, 87, 88) specifically established that workers assigned by Welding for work on Exxon's platforms were to be considered independent contractors:

III. It is understood and agreed that all work so done by Contractor [Welding] shall meet with the approval of Humble's [Exxon's] representatives, but that *the detailed manner and method of doing the work shall be under the control of Contractor*, Humble being interested only in the result obtained and that *Contractor is an independent Contractor as to all work performed hereunder*: [Emphasis added.⁴]

Following his injury, St. Pierre filed a claim against his employer, Welding, under LHWCA, 33 U.S.C. § 904,

² "CA" refers to the Appendix filed with the Fifth Circuit Court of Appeals in the St. Pierre v. Exxon Corporation et al. case No. 76-1196.

⁴ The contract also provided Exxon with the benefit of Welding's insurance coverage in the event that one of Welding's employees filed a claim against Exxon on the theory of being Exxon's employee through application of the borrowed servant doctrine. This subsection reads:

10. Endorsement that a claim made against Humble [Exxon] and/or its underwriters by an employee of assured-Employer [Welding] hereunder based on the "doctrine of borrowed servant" shall, for purposes of this insurance, be treated as a claim arising under this policy against the assured-Employer and Humble shall receive the benefit of this insurance.

and he is currently receiving benefits under this Act (CA 39, 65). St. Pierre also filed two suits in the United States District Court for the Eastern District of Louisiana under the Lands Act, 43 U.S.C. § 1333(b), one against Exxon (No. 76-1196) and another against Exxon and Exxon employees Toups, Boss, and Moore (No. 76-2668) for negligence proscribed by the common law of the State of Louisiana. The reason for bringing this action was to obtain full recompense for all of the damages suffered because of St. Pierre's injury negligently caused by Exxon.

Exxon in its response to interrogatories failed to establish that St. Pierre was actually an employee of Exxon (CA 26, 27, 42, 43) and Exxon conceded that it did not file an accident report as required of employers under the LHWCA, 33 U.S.C. § 930 (CA 33, 47). Nevertheless, Exxon filed a motion for summary judgment, claiming that St. Pierre was its "borrowed servant", or employee, and thus that St. Pierre's exclusive claim was for compensation in accordance with LHWCA.

In a sworn statement and other materials filed in opposition to Exxon's motion, the following facts, among others, appeared: St. Pierre swore that he was an employee of Welding, that he had been employed as a welder by Welding for seventeen years (CA 51, 127), that Exxon contracted Welding to carry out a specific project (hooking up a generator), and that Exxon requested the service since it did not have a welder of its own at the site (CA 51). In addition, it was stipulated in the contract that Welding would furnish the tools for all of St. Pierre's work (CA 86).

A statement filed by the attorney for St. Pierre pursuant to the rules of the District Court below, a signed statement of St. Pierre and other elements of the record set forth facts which support the argument that

St. Pierre was acting in the capacity of an independent contractor, not as an employee of Exxon, at the time of the accident. The relationship between Exxon and Welding was that of customer and independent contractor (CA 86, 74) whereby Exxon identified projects (CA 51, 73), Welding employees carried out the projects using their own discretion and judgment without direct technical direction from Exxon (CA 111, 112), and Welding billed Exxon for each project so identified and executed (CA 72).

At the time of the accident St. Pierre had been on a project to hook up a generator for three days (CA 51).

The work being performed by St. Pierre was of a specialized nature, i.e., welding, fitting and steel construction (CA 111). As an expert welder, the only welder on the platform at the time of the injury (CA 51), St. Pierre supervised and controlled his own method of performing his specialized tasks without direct supervision by Exxon. Accordingly, Exxon's directions to St. Pierre were only for the purpose of indicating the work to be done and its control over St. Pierre was of the same nature as its control over Welding: a customer-independent contractor relationship. Thus St. Pierre through his attorney has denied that Exxon exercised complete and absolute control over St. Pierre's work since he was only told what projects to work on and he pursued Welding's obligations in his own specialized and expert manner (CA 112).

Despite these facts, the District Court found on the basis of other affidavits and depositions that St. Pierre "for all practical purposes has been the employee of Exxon", that the basic "facts are not in dispute," that St. Pierre was Exxon's "borrowed servant," and that therefore St. Pierre's exclusive remedy was under LHWCA (A 4a). The District Court granted summary judgment to Exxon (A 6a).

The Fifth Circuit Court of Appeals combined the St. Pierre cases with a similar case involving one Gaudet, who had also performed work for Exxon but who had been regularly employed by Tidelands Marine Service, Inc. The court affirmed the granting of summary judgment in all three cases. In doing so, it held, *inter alia*, that “[c]onsidering this as best viewed as a question of the extent of coverage under the LHWCA, federal law applies” (A 17a), and “the issue of whether a relationship of borrowed servant existed is a matter of law” (A 18a).

REASONS FOR GRANTING CERTIORARI

The initial two reasons for granting certiorari are the same as set forth in the companion *Gaudet v. Exxon Corp.* petition No. 77-1284. Out of deference to judicial economy these reasons are not reprinted herein but rather are restated by reference *in haec verba*.⁵ In brief sum, however, these reasons are that:

- (1) The Fifth Circuit violated this Court's rulings by determining petitioner's rights and status under LHWCA, and applied federal law, rather than under the Lands Act, which would have made state law applicable, and
 - (2) There is a conflict among the Circuits, and this Court should decide, as to whether the status of borrowed servant under the Lands Act is a question of law or fact, and which criteria should be applied to determine that status.
- 3. The Granting of Summary Judgment Under the Lands Act on a Disputed Record Such as This One Is Both Erroneous and Precedentially Dangerous.**

Whether the issue of borrowed servant status be termed one of law or fact, it necessarily rests on underlying

⁵ See pages 7-15 of the Gaudet petition No. 77-1284 filed with this Court on March 14, 1978.

facts. Put another way, no matter which criteria or factors are adopted, they must be related to a particular factual context; they cannot be blindly applied without regard to the situation that actually existed between the regular employer, the employee, and the alleged borrowing company.

With that in mind, we respectfully submit that it should be a matter of grave concern when federal courts begin taking cases from juries under circumstances such as existed here. It is axiomatic, of course, that summary judgment is warranted only when no genuine issue as to any material fact exists.⁶ Yet in this case, the record before the trial court contained the following facts, among others:

(a) A contract between Exxon and Welding, St. Pierre's regular employer, provided that St. Pierre's work was to be under the control of Welding and that Welding was to be an independent contractor as to all such work performed (CA 86, 87);⁷

⁶ Fed. R. Civ. P. 56. This Court has pointed out that Rule 56 should not be allowed to permit "[t]rial by affidavit" as a substitute for trial by jury which so long has been the hallmark of 'even handed justice.' *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). Moreover, the burden is on the party seeking summary judgment to establish that no material issue of fact is in dispute, and all matters must be construed most favorably to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The danger of too-liberal use of summary judgment has often been pointed out by this and other courts. E.g., *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 500 (1969); *Kennedy v. Silas Mason Co.*, 384 U.S. 249, 256-257 (1948); *American Mfrs. Mut. Ins. Co. v. American Broadcasting—Paramount Theatres, Inc.*, 388 F.2d 272, 279 (2d Cir. 1967).

⁷ The Fifth Circuit suggests that the unequivocal language of the Exxon-Welding contract is somehow compromised by a later provision under Welding's insurance coverage. But that provision related only to possible instances where an employee might attempt to make a claim against some one as a borrowed servant.

(b) Exxon admitted that St. Pierre was actually a Welding employee (CA 57, 58), and St. Pierre swore that he had been an employee of Welding for seventeen years (CA 51, 41) and that he had been interviewed, hired, and paid by Welding (CA 112);

(c) Welding's insurer paid LHWCA compensation benefits to St. Pierre as an employee of Welding (CA 39, 65);

(d) St. Pierre swore, or other evidence established that the usual business relationship between Exxon and Welding was a customer-independent contractor relationship whereby Exxon identified projects, Welding personnel performed the obligations of Welding as specified in the contract, Welding's employees completed the projects in their own way without direct technical direction from Exxon, and Welding billed Exxon for each project so identified and executed (CA 51, 111-113, 72).

(e) Consistent with the characterization above, Exxon's directions to St. Pierre were only for the purpose of indicating the work to be done and coordinating activities at the site, and in that sense Exxon's control over St. Pierre was of the same nature as its control over Welding: a customer-independent contractor relationship (*id.*);

(f) St. Pierre swore that he was working on a project at the time of the accident as a result of Exxon's con-

It did not concede that a borrowed servant relationship could in fact exist, and it certainly had no relevance to the situation here, where Exxon is asserting borrowed servant status as a defense (see n. 4, *supra*).

The Circuit Court also presumed that St. Pierre was a borrowed servant because of the long period during which he worked on Exxon's platforms. It failed to realize that he undoubtedly was aware of the Exxon/Welding contract and therefore assumed during this entire period that he was *not* a borrowed servant but rather an independent contractor, as the contract specifically provided.

tract with Welding, that since Exxon had no welders at the site his services were requested to assist a roustabout crew of general laborers and a supervisor unskilled in the art of specialized welding (*id.*). Moreover St. Pierre swore through counsel that he was usually told what welding work needed to be done (CA 112), and that he supervised and controlled his own method of performing his specialized tasks without direct project supervision by Exxon (CA 111, 112).

As in *Gaudet*, we cite these facts not to demonstrate that the ruling below was in error, which was clearly the case since there were genuine issues of fact in dispute that were relevant even as to the "principal" criteria cited by the Fifth Circuit. We recognize that this Court does not sit simply to correct error. Our point is that if, in an effort to handle burgeoning dockets, federal courts are allowed to take cases from juries where facts are as completely in dispute as they were in this case, then problems of constitutional dimension arise and should warrant summary reversal by this Court.

CONCLUSION

We respectfully urge that for each of the above reasons, the Court should grant certiorari and either reverse summarily the judgment below, or reverse said judgment after argument and remand the case for a trial by jury.

Respectfully submitted,

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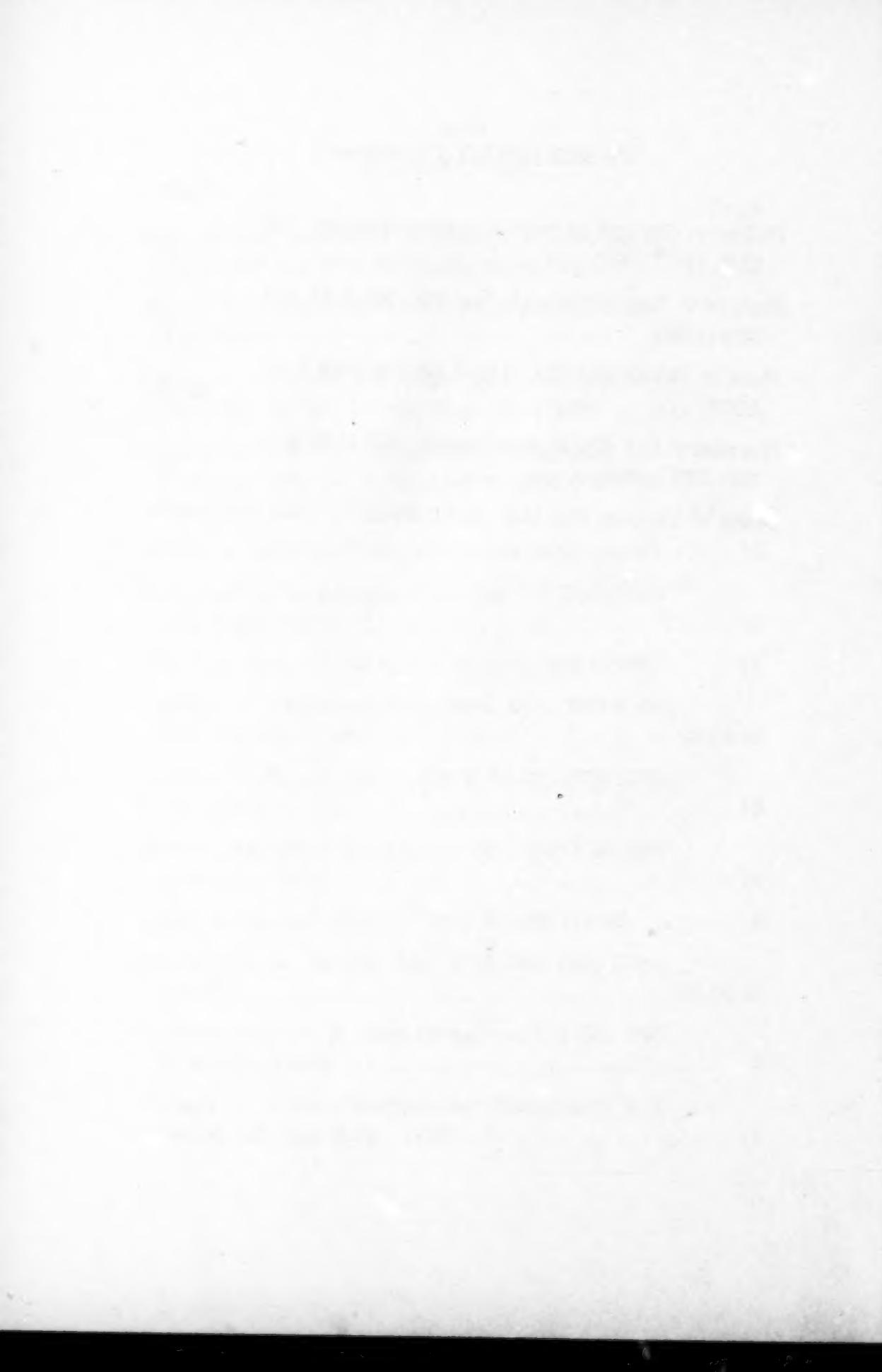
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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The ruling of the District Court granting respondent's Motion for Summary Judgment, reprinted as Appendix B of the Petition at page 4A is unreported.¹

The opinion of the Court of Appeals for the Fifth Circuit (Petitioner's App. C) is reported at 562 F.2d 351.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The pertinent provisions of the Outer Continental Shelf Lands Act, as amended (43 U.S.C. §§1331(a), (b), and (c)), and the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U.S.C. §§904, 905(a), 930(a) and (i)), are set forth in the Petition at Appendix F.

QUESTIONS PRESENTED

1. Whether a plaintiff's remedies against a third party for injuries received on an offshore platform are properly found in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) once a Court has determined, pursuant to the Outer Con-

¹ All page citations to the appendices refer to the Appendix contained in the companion case, *Gaudet v. Exxon Corporation*, Petition No. 77-1284, filed with this Court on March 14, 1978.

tinental Shelf Lands Act (Lands Act), under State law, that he is the borrowed servant of that third party.

2. Whether the status of borrowed servant is properly determined by the Court when there is no genuine issue as to any material fact.
3. Whether the factors involved in a determination of borrowed servant status are to be weighed as appropriate in each particular case rather than using some "fixed test."
4. Whether respondent's motion for summary judgment was properly granted where all necessary undisputed facts existed in the record for the Court to make a determination of the borrowed servant status of the plaintiff.

REASONS FOR DENYING CERTIORARI

1. Petitioner's status was determined under the Lands Act applying State law. Once status was determined, the Lands Act itself directed the use of the LHWCA which provides petitioner's remedies.
2. There is no conflict among the circuits as to the determination of the status of borrowed servant under the Lands Act.
3. The granting of summary judgment was proper because there were no genuine issues as to any material fact.

STATEMENT OF THE CASE

This case arises out of personal injury sustained by Ruven St. Pierre, an employee of Bourne's Welding Service, Inc. (hereinafter called Bourne) on July 5, 1974, while working on a fixed platform owned by Exxon Corporation (hereinafter called Exxon) located on the Outer Continental Shelf, offshore of the State of Louisiana. The injury is alleged to have occurred when the plaintiff was standing on a 55-gallon drum which was being held by the Exxon supervisor. The plaintiff was in the process of welding a channel iron for the installation of an electrical generator under the direct supervision of an Exxon supervisor when his slag fell into the bunghole, causing an explosion resulting in his injuries.

A Motion for Summary Judgment of Dismissal was filed based on the grounds that Mr. St. Pierre was Exxon's borrowed servant and that his exclusive remedy was under the LHWCA.²

² The Outer Continental Shelf Lands Act specifically makes applicable the provisions of the Longshoremen's & Harbor Workers' Act for compensation for injuries sustained by employees engaged in the work of producing oil or gas or other natural resources from the subsoil or seabed of the Outer Continental Shelf. 43 U.S.C.A., Section 1333. One of the provisions of the Longshoremen's & Harbor Workers' Act makes the liability of an employer for compensation benefits provided in the Act on account of injury to or death of an employee exclusive and in place of all other liability of such employer to the employee and anyone otherwise entitled to recover damages from such employer on account of such injury or death. 33 U.S.C.A., Section 905. In *Champagne v. Penrod Drilling Co.*, 341 F.Supp. 1282 (W.D. La., 1971), 459 F.2d 1042 (5th Cir., 1972), the Fifth Circuit affirmed a ruling that the provisions of the Longshoremen's & Harbor Workers' Act, including the exclusive remedy provision, apply as well to "borrowed employees." Writs were denied. 409 U.S. 1113, 34 L.Ed. 2d 696.

Petitioner states on page 5, Section "D", Subsection III, of Questions Presented, "That he (meaning plaintiff) supervised and controlled his own performance without direct project supervision by Exxon." This statement is in direct conflict with plaintiff's own testimony and his deposition taken on October 7, 1975:

"Q. But on this particular occasion you were working under the direction of Bennie Toups, is that correct?

A. Right.

Q. Did you receive your orders from Bennie Toups?

A. Right.

"Q. There was no Bourne Welding Supervisor involved in this job, was there?

A. No.

Q. So, in other words, you worked directly under Bennie Toups.

A. Right.

Q. And you took your orders from him?

A. Correct."

(St. Pierre deposition pp. 13-14)

* * * *

"Q. How would you have known what to do?

A. Well, Exxon people would tell me like the pusher, Bennie Toups would tell me what needs to be fixed or what needs to be built and I take my orders from him and do it."

(St. Pierre deposition p. 14)

There was no dispute about any of the material facts before the previous tribunals. Those facts show clearly that:

1. The work being performed was that of Exxon — the production of oil and gas from the Outer Continental Shelf.
2. The work was being performed on Exxon's platform, and Exxon supplied the necessary facilities for transportation and lodging.
3. The employment was for an indefinite period of time.
4. Bourne's Welding Services neither directed nor supervised plaintiff's work; it exercised no control over plaintiff in his performance of the work.
5. The work product of Mr. St. Pierre was to the complete benefit of Exxon.
6. Exxon exercised complete and absolute authoritative direction and control over the work and over the plaintiff in his performance of that work.
7. Plaintiff willingly acquiesced in the arrangements for his performance of that work under the authoritative direction and control of Exxon's supervisory employees and, in fact, had done so for 17 years.
8. Exxon had absolute discretion to discharge plaintiff from the performance of

his work for Exxon upon Exxon's platforms.

The District Court found as undisputed facts as follows:

"These facts are not in dispute. Plaintiff was one of several employees that Bourne furnished to Exxon. At the time of his injury, plaintiff was working on an Exxon gang and was under the supervision of an Exxon pusher, as he had been for three months prior to the accident. For seventeen years plaintiff had only worked offshore for Exxon while employed by Bourne. There was no Bourne supervisor on the platform at the time of the accident nor had there been one during the preceding three months. Plaintiff acquiesced in this arrangement without complaint. Exxon had the power to discharge plaintiff from working for it though Exxon could not terminate plaintiff's employment with Bourne. Exxon paid Bourne which in turn paid plaintiff. Exxon arranged for plaintiff's housing, food and transportation through other contractors. The work plaintiff did was for the benefit of Exxon and not Bourne. Accordingly, under the standards outlined in Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir., 1969), and Champagne v. Penrod Drilling Co., 314 F.Supp. 1282 (W.D.La., 1971), aff'd 459 F.2d 1042 (5th Cir., 1972), cert. den. 409 U.S. 1113, we hold that plaintiff was a 'borrowed servant' of Exxon." (Petitioner's App. B, pages 4a and 5a).

In support of its Motion, Exxon filed affidavits of its Senior Field Superintendent, Mr. Joe W. Moore, and Senior Staff Assistant, Mr. Richard N. Boss, together with a copy of a certificate of insurance issued by the Home Indemnity Company. It also filed the depositions of the plaintiff, Ruven St. Pierre, and Exxon Field Maintenance Foreman, Bennie P. Toups.

The petitioner, on Page 7, Paragraph 2, of his Petition for Writ of Certiorari, states that a sworn statement and other materials were filed in opposition to Exxon's Motion. This is simply not correct and is not supported by the record. Counsel for plaintiff below presented a brief in opposition to Exxon's Motion for Summary Judgment, but no contravening affidavits or documents were filed in opposition to the undisputed facts submitted by Exxon.

The District Court found that the essential facts were not in dispute, that on the basis of the affidavits presented and the depositions of Mr. Toups and Mr. St. Pierre, Mr. St. Pierre was in fact a "borrowed employee" of Exxon and that his exclusive remedy was under the LHWCA. (Petitioner's App. B, Page 4a.) The District Court granted summary judgment to Exxon.

The Fifth Circuit Court of Appeals combined the St. Pierre case with a similar case involving one Russel James Gaudet. The Court affirmed the granting of summary judgment in both of these cases. (Petitioner's App. C, page 9a).

REASONS FOR DENYING CERTIORARI

1. Petitioner's Status Was Determined Under The Lands Act Applying State Law. Once Status Was Determined, The Lands Act Itself Directed The Use Of The LHWCA Which Provides Petitioner's Remedies

It is clear from a careful reading of the District Court's ruling and the decision of the Fifth Circuit that there has been no error in the result reached by the Lower Courts. Perhaps not every step in the Court's reasoning process was committed to writing, but this decision should not be reviewed by this Honorable Court, since a reading of the two Statutes (Lands Act and LHWCA) gives ample authority for the Courts' rulings.

It should be noted at the outset that the sole specification of error presented to the Fifth Circuit was that the lower Court held that there was no genuine issue as to a material fact and therefore erred in granting summary judgment. Petitioner has seized upon certain language in the opinion of the Fifth Circuit and used that language to raise in this Court, for the first time, the issue of whether his status as a borrowed servant was decided under the Lands Act or the LHWCA. This issue was not briefed below and it is inappropriate to now urge it. *State v. Taylor*, 353 U.S. 553 (1957); *Lawn v. United States*, 355 U.S. 339 (1958); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317 (1967). It is submitted that the reason this issue was not raised below was that petitioner's status had been determined under the proper law by the lower Court.

However, assuming arguendo that this issue had been properly preserved, there is nothing to indicate error. Petitioner claims that his status as a "borrowed employee" of Exxon was determined by the Fifth Circuit using Federal standards pursuant to the LHWCA rather than State standards as commanded by the Lands Act.

What is ignored, of course, is that the Fifth Circuit did not determine petitioner's status. This was determined in the lower Court. The Fifth Circuit upheld this determination. Thus, any complaint as to the method of determination should have been raised in the Appeals Court. But, petitioner is not complaining that the lower Court erred and that the Fifth Circuit compounded this error. What he is complaining of is that the language of the Fifth Circuit opinion, conceivably, may be open to more than one interpretation. However, no matter how the language is interpreted, the fact remains that the only action the Appeals Court took was to uphold a perfectly correct decision. By complaining of the Fifth Circuit's method of "determining" his status, rather than having complained below of the lower Court's method, petitioner is simply saying that the Appeals Court was right for the wrong reason. This Court should not now address itself to an issue not raised below simply because the Appeals Court's language was unsatisfactory to petitioner.

The decisions below clearly show that it was not until petitioner's status had been determined that the LHWCA was looked to to determine his remedies. That this is proper is admitted by petitioner in his brief (p. 7).

Because petitioner was injured on an offshore platform, he looked to the Lands Act for redress. Vis-a-vis his general employer, Bourne's Welding Services, Inc., the Act indicated that he should look to the LHWCA for his remedies. This he did and received the benefits outlined in that Act. As to any other party, the Lands Act directed him to the law of the adjacent State, in this case Louisiana.

During the litigation, respondent raised as a defense the question of petitioner's status. The concept of "borrowed servant" is well recognized in Louisiana. *Benoit v. Hunt Tool Co.*, 219 La. 380, 53 So.2d 137 (1950); *B&G Crane Service v. Thomas W. Hooley & Sons*, 227 La. 677, 80 So.2d 369 (1955) and the cases cited therein.

Contrary to petitioner's statement, Louisiana law and Federal law use the same criteria for determining borrowed servant status. *Champagne v. Penrod Drilling Company*, 341 F.Supp. 1282 (W.D. La., 1971), aff'd. 459 F.2d 1042 (5th Cir., 1972). The trial court recognized that the criteria are the same. (Petitioner's App. 1A). Using these criteria and finding no essential facts in dispute (Petitioner's App. 2A) the Court determined that petitioner was a "borrowed employee" of Exxon.

Once this determination was made pursuant to State law, petitioner's remedies were the same as those of any other employee of Exxon injured on an offshore platform. The Lands Act specifically provides that those remedies are found in the LHWCA and consist of compensation payments. Petitioner does not deny that he received such payments. Whether these benefits

were paid by Exxon, Bourne, or an insurer, is of no moment.

Petitioner cites a number of cases supposedly holding that borrowed servant status is a question of fact in Louisiana. Two of these cases, *D'Antoni v. Sara Mayo Hospital*, 144 So.2d 643 (La. App., 1962), and *Grant v. Touro Infirmary*, 254 La. 204 (1969), simply do not address that question. A third, *Danks v. Maher*, 177 So.2d 412 (La. App., 1965), erroneously cites *D'Antoni* as authority. The other three cases cited are distinguishable in that they each involved disputed facts.

In the instant case, the facts were not in dispute (Petitioner's App. 2A-3A). In such a situation, it is appropriate under Louisiana law that the judge determine status. *Owens v. AAA Contracting Company*, 219 So.2d 228 (La. App., 1969); *Kiff v. Travelers Insurance Company*, 402 F.2d 129 (5th Cir., 1968).

Petitioner states that it is "immediately imperative that the duties and responsibilities of those who operate offshore platforms toward those who work on them be properly established." It is submitted that the duties of those operating offshore platforms to those who work on them have been properly established by the Congress by enacting into law the Lands Act and the LHWCA. There is no evidence that any further laws are needed because of exploratory operations along the Eastern Seaboard. Mere speculation that present laws may sometime in the future prove inadequate is no reason for the involvement of this Court to review this case.

**2. There Is No Conflict Among The Circuits
As To The Determination Of The Status Of
Borrowed Servant Under The Lands Act.**

Petitioner states that the Fifth Circuit "recognized that one of its own earlier rulings, *Guidry v. Texaco, Inc.*, 430 F.2d 781, 784 (5th Cir., 1970), had held to the contrary," (Petitioner's brief p. 12), i.e., that the existence of a borrowed servant relationship is a matter of fact. This was not the reason for the Fifth Circuit's mention of *Guidry*. Rather, the Court cited *Guidry* simply to show that summary judgment is not proper when there is a dispute as to material facts. *Guidry* was cited because it was in contrast to the instant case not because it was in conflict with it.

The *Guidry* case was decided by the judge, sitting without a jury, on the basis of a disputed record. He found that plaintiff was not a borrowed servant of defendant. The Fifth Circuit, very reluctantly, affirmed:

"The findings recited above were made on disputed evidence given by live witnesses in the presence of the district judge. After reviewing the evidence, we are not able to say that these findings were clearly erroneous." *Id.* at 784.

In attempting to find a conflict among circuits, petitioner has obviously misread the decisions cited by the Fifth Circuit, *Gudgel v. Southern Shippers, Inc.*, 387 F.2d 723 (7th Cir., 1967) and *McCollum v. Smith*, 339 F.2d 348 (9th Cir., 1964).

Petitioner states, "In *Gudgel*, the Seventh Circuit in a case involving neither the Lands Act nor LHWCA recognized the borrowed servant issue as one of fact and allowed a jury, under state law, to consider it." (Petitioner's Brief, p. 13).

The question to be decided in *Gudgel* was whether one defendant was the borrowed servant of a second defendant so as to make that defendant liable to plaintiff under the doctrine of *respondeat superior*. Although the question went to the jury, when the jury found that such a relationship existed, the trial court entered a judgment notwithstanding the verdict. In affirming, the Seventh Circuit stated:

"The evidence in support of Southern Shippers' position is overwhelming." *Id.* at p. 727.

and

"Considering all of the evidence we do not believe the jury could reasonably conclude that Freischlag was undertaking the business of Southern Shippers at the time of the collision." *Id.* at p. 726. (Emphasis supplied).

Thus, instead of supporting petitioner's position, *Gudgel* reinforces the Fifth Circuit's position, i.e. when the facts are not in dispute, it is proper that the question of borrowed servant status be decided by the Court.

Petitioner states that, in *McCollum*, the Ninth Circuit held that whether there was a change of masters

was one of fact when the facts are debatable. (Emphasis supplied). This is a fair statement although it is more dicta than holding.

However, as in the instant case, the facts were not debatable and the Ninth Circuit affirmed the trial court's granting of a directed verdict. After discussing the concept of borrowed servant, the Court stated:

"A careful consideration of the entire record in the light of these propositions makes manifest the conclusion that Choy was the servant of Concrete, so far as the outcome of this case is concerned." 339 F.2d 348, 352.

The Court also stated:

"In conclusion, we are fully satisfied that the trial judge correctly appraised the evidence and that his ruling was right." *Id.* at p. 352. (Emphasis supplied).

Thus, in the instant case, the Fifth Circuit upheld the grant of summary judgment on the question of borrowed servant status when the facts were undisputed. In support thereof, it cited a Seventh Circuit decision upholding the entry of a judgment NOV and a Ninth Circuit decision affirming a directed verdict on the same issue. Rather than being in conflict, as petitioner alleges, all three decisions are in perfect harmony.

Even were there a conflict among circuits, petitioner would find scant comfort in that fact. Each of the cases involved, *Gudgel*, *McCollum*, and *Gaudet*

interpreted State law; the first two because they were diversity actions and this case because it was filed under the Lands Act. To find differences among State laws is not unusual. It is stretching a point to state that such differences in State laws establish the conflict between or among the circuits that has been an historical reason for granting certiorari. As this Court has stated:

"As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari." *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

Also, there is no question of which criteria to apply in deciding the status of borrowed servant. Almost seventy years ago this Court held that:

"... we must inquire whose is the work being performed, — a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221-222 (1909).

Through the years, these criteria have been honed and refined, expounded on and made clearer until today, in the Fifth Circuit, nine factors are evaluated. *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir., 1969). This does not mean that a numerical weight is to be given each factor and that when some magic score is reached a worker becomes a borrowed servant. Rather, all factors are to be weighed as may be appropriate in a given

case. No "fixed test" is used. *Champagne v. Penrod Drilling Co.*, 341 F.Supp. 1282 (W.D. La., 1971), aff'd 459 F.2d 1042 (5th Cir., 1972).

The Fifth Circuit clearly held in *Ruiz*, *supra*, that:

"Nor is there any evidence which could be inferred to create a borrowed-servant relationship between National and Ruiz. All the facts being overwhelmingly to the contrary, the court correctly refused to submit this issue to the jury. *Boeing Co. v. Shipman*, 5 Cir., 1969, 411 F.2d 365. This Circuit, the Seventh and Ninth Circuits have, in the absence of substantial evidence to the contrary, held the issue of whether a relationship of borrowed servant existed is a matter of law. *Kiff v. Travelers Insurance Company*, 5 Cir., 1968, 402 F.2d 129; *Gudgel v. Southern Shippers, Inc.*, 7 Cir., 1967, 387 F.2d 723; *McCollum v. Smith*, 9 Cir., 1964, 339 F.2d 348."

The point is that where the necessary facts are not in dispute, as they are not here, the Court rules on this issue as a matter of law.

3. The Granting Of Summary Judgment Was Proper Because There Were No Genuine Issues As To Any Material Fact

Rule 56 of the Federal Rules of Civil Procedure authorizes summary judgment where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth of the case is, and where no

genuine issue remains for trial. The Rule does not cut litigants off from their right to a trial by jury if it is determined from the facts that are before the Court that there are no genuine material facts in dispute. *Poller v. Columbia Broadcasting System*, 368 U.S. 467 (1962). See also *Cates v. Beauregard Electric Cooperative, Inc.*, 328 So.2d 367, La. Sup. Ct. (1976).

Subsection "E" of Rule 56 should be specifically noted in that it states with particularity the following:

"... When a Motion for Summary Judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The key issue of whether or not a motion for summary judgment should be granted is based on the facts before the Court and whether or not those facts are in dispute. It was determined by two tribunals, the District Court (Petitioner's App. A) and the Fifth Circuit Court of Appeals (Petitioner's App. C), that the issues before them were not in dispute and that as a matter of law, petitioner was the "borrowed servant" of Exxon and that his sole remedy was under the LHWCA.

Mr. St. Pierre did not file any affidavits in opposition to Exxon's Motion for Summary Judgment, nor was there any dispute as to those facts which the Court re-

lied upon in making its determination that Mr. St. Pierre was the "borrowed servant" of Exxon. There was no dispute that for seventeen (17) years he had been working in an Exxon gang on an Exxon platform under the direct supervision of an Exxon foreman, and that the work that he did was under the direct control and supervision and inured to the benefit of Exxon. When factual issues are not in dispute, a Motion for Summary Judgment under Rule 56 is proper and this Court should not waste its time reviewing a factual situation that has already been upheld by the lower Court and the Fifth Circuit Court of Appeals.

CONCLUSIONS

We respectfully urge that for each of the above reasons the Court should not grant Certiorari and should affirm the Judgment of the Lower Court.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1328

RUVEN ST. PIERRE,
v. *Petitioner,*

EXXON CORPORATION, BOOKER DRILLING CO., INC.,
and LIBERTY MUTUAL INSURANCE CO.,

Respondents,

RUVEN J. ST. PIERRE,
v. *Petitioner,*

EXXON CORPORATION, BENNIE P. TOUPS,
RICHARD N. BOSS and JOE W. MOORE,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Only two brief points are in order in the light of
Respondents' Brief in Opposition.

1. Respondent has challenged both Petitioners' position in this and a companion Gaudet Petition No. 77-1284 that the determination of borrowed servant status is a question of fact in Louisiana.¹ In one of the most

¹ See Brief for Respondent in Opposition, No. 77-1328, paragraph 2, page 12.

recent court of appeals cases in Louisiana, which has not heretofore been cited, *Vincent v. Ryder Enterprises, Inc.*, 352 So.2d 1061 (La. App. 3d Cir. 1977), the court specifically held at 1065:

Whether a person is a "borrowed servant" is an issue of fact. *LeBlanc v. Roy Young, Inc.*, 308 So.2d 443 (La. App. 3d Cir. 1975); *Nichols Construction Corporation v. Spell*, 315 So.2d 801 (La. App. 1st Cir. 1975).

The facts in that case were quite similar to those in the instant one, and the borrowed servant issue was submitted to a jury, with the approval of the state appellate court.

2. In Respondents' statement of the case,² they question in at least one respect the statement of facts contained in St. Pierre's Petition. In the paragraph in question—the second paragraph on page 7—Petitioner intended to state that a sworn statement and other materials had been filed as part of the record at those locations identified in the Petition. As so stated, the paragraph is entirely accurate.

Respectfully submitted,

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² See Brief for Respondent in Opposition, No. 77-1328, paragraph 2, page 8.